STATUTES CITED.

U. S. C., Title 15, § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

U. S. C., Title 15, § 14: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale of contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

U. S. C., Title 15, § 15: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

U. S. C., Title 15, § 1221, *et. seq.*, Preamble to 70 Stat. 1125 (1956):

"An Act

to supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers by enabling franchise auto-

mobile dealers to bring suit in the district courts of the United States to recover damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers."

U. S. C., Title 15, § 1221: "As used in this chapter—

• • •

"(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract. • • •

"(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

U. S. C., Title 15, § 1222: "An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in de-

fense of any such action the failure of the dealer to act in good faith."

U. S. C., Title 15, § 1224: "No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States."

3 *United States Code, Cong. & Ad. News* (84th Cong., 2d Sess. 1956):

p. 4596. "Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is [p. 4597] required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts. The bill as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises. • • •

p. 4598. "Distributive conditions condemned by the Federal Trade Commission in its report on the motor-vehicle industry, issued in 1939, have continued up to the present time, according to investigations [of Subcommittees] • • •

"The Commission finds that motor-vehicle manufacturers, and, by reason of their great power, especially General Motors Corp., Chrysler Corp., and Ford Motor Co., have been, and still are, imposing on their respective dealers

unfair and inequitable conditions of trade, by requiring such dealers to accept, and operate under agreements that inadequately define the rights and obligations of the parties and are, moreover, objectionable in respect to defect of mutuality; that some dealers, in fact, report that they have been subjected to rigid inspections of premises and accounts, and to arbitrary requirements by their respective motor-vehicle manufacturers to accept for resale quantities of motor vehicles or other goods, deemed excessive by the dealer, or to make investments in operating plants or equipment without adequate guaranty as to term of agreement or even supply of merchandise; and that adequate provisions are not included for an equitable method of liquidating of such investments, sometimes made at the insistence of the respective motor-vehicle manufacturer. * * *

p. 4599. "The hearings of the investigations conducted during this Congress in the Senate contain numerous instances of automobile manufacturers coercing and intimidating their franchised dealers. A primary source of the manufacturers' power over their dealers stems from the unilateral nature of the franchise agreements. * * *

p. 4600. "This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith in performing or complying with any of the provisions of his franchise or in terminating, canceling, or not renewing his franchise. * * *

Explanation of Bill (4601-4604).

p. 4603. "The existence of coercion or intimidation depends upon the circumstances arising in each particular case and may be inferred from a course of conduct. For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts accessories, or sup-

plies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation. Similarly coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or to sell a specified quota of, parts, accessories, and tools made or approved by the manufacturer.

"Manufacturer coercion or intimidation or threats thereof is actionable . . . where it relates to the termination, cancellation, or nonrenewal of the dealer's franchise. Thus, where a dealer's resistance of manufacturer pressure is related to cancellation or nonrenewal of his franchise a cause of action would arise."

OPINION OF COURT OF APPEALS.

Knoch, Circuit Judge. Fabert Motors, Inc., plaintiff-appellant herein, filed its complaint in two counts in the United States District Court to recover damages from Ford Motor Company, defendant-appellee, hereinafter called "Ford," for violation of the anti-trust laws and the Automobile Dealers' Franchise Act, Title 15, U. S. C., §§ 1221-1225, respectively.

The District Court granted Ford's motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, and this appeal followed.

The District Judge had before him the pleadings, the deposition testimony, answers to interrogatories, affidavits, a statement of uncontested facts, and a stipulation respecting documents. Most of this material has been presented to us in the appendices filed by appellant and appellee.

In the first count, plaintiff asserts that pursuant to a conspiracy to combine Edsel and Lincoln-Mercury dealerships, Ford coerced its Lincoln-Mercury dealers into ac-

cepting the competitive Edsel agencies or relinquishing their Lincoln-Mercury agencies. Plaintiff alleges that plaintiff did not wish to accept the Edsel agency and thus was forced to submit its resignation and economically coerced into signing a general release on pain of forfeiting certain payments for merchandise, equipment and rental of the dealership premises in which plaintiff had made large investments. These payments made by Ford to plaintiff over a period of seven months totalled in excess of $86,000. Plaintiff seeks to recover treble damages and attorneys fees in the sum of $1,100,000.

The second count sets forth approximately the same facts and seeks damages of $300,000 under the Automobile Dealers' Franchise Act.

The plaintiff asserts that the general release, on which Ford relies, was secured through fraudulent concealment of the fact that Ford intended to discontinue manufacture of the Edsel. In its complaint, filed August 15, 1961, plaintiff offers for the first time to return the consideration received for the general release which was executed on or about October 2, 1959.

Negotiations concerning the resignation of the agency, release and payments were conducted over a lengthy period of some months and included several offers and counter-offers in the course of which there allegedly occurred two statements on which plaintiff bases its claim of coercion.

In February, 1959, about 8 months before the execution of the general release, Thomas A. Coward, Ford's Chicago District Sales Manager, during a visit to plaintiff's place of business in Champaign, Illinois, told Elwood Fabert, president, director and shareholder of plaintiff, that he had no choice in the matter of taking on the Edsel franchise because Ford could and would cancel him

out. Mr. Fabert testified that he told Mr. Coward that he did not believe that Ford would cancel him out and asked for time to think it over. He testified further that, at this conversation or at the later conversation described below, Mr. Coward pointed out the special financial advantages which would accrue to plaintiff from resigning its agency rather than having it canceled, in which latter case plaintiff would receive only what the agency contract required and nothing in addition to that.

The second conversation took place in June, 1959, about three months before the execution of the general release. At that time, Mr. Coward told Mr. Fabert that Ford wanted to have only one dealer handling both Lincoln-Mercury and Edsel by October 1, 1959, and that if plaintiff did not resign its agency, that agency would be cancelled. Mr. Coward wrote out by hand, a form of resignation, leaving blank spaces for insertion of figures.

After consulting with its attorney and after special meetings of the shareholders and directors of plaintiff (as recorded in minutes prepared by plaintiff's attorney) which are included in the record before us, plaintiff wrote Ford a letter of resignation dated July 2, 1959, using the terms suggested by Mr. Coward but inserting specific sums to be paid plaintiff for signs and tools plus $36,000 for rent on the premises and "benefits" under the original agency agreement. There were exchanges of correspondence and the parties agreed on a reduction of the figure of $36,000 to $24,000. This was still in excess of the amount which Ford would have been obligated to pay under the terms of its contract if the agency were cancelled. Plaintiff asserts the contrary in its briefs, but in his deposition, Elwood Fabert said there was no market in which signs and special equipment could be sold. The contract called only for the fair market value to be paid on cancellation. The agreement also provides that upon

termination by Ford, and in the event that the dealer so elects, Ford shall aid and assist the dealer in disposing of or leasing the dealership premises. However, Ford is not obligated to make any "rent" payments in the event that the dealer or anyone else occupies the premises for any purpose for a period of more than 90 days following the effective date of termination. In this case, plaintiff continued to occupy the premises and at the time of the general release had been engaged for almost a month in sales and service operations with reference to another make of automobile. The plaintiff was a lessee of the premises which were owned individually by Mr. and Mrs. Elwood L. Fabert.

Ford did combine its Lincoln-Mercury and Edsel agencies, appropriating about $5 million for financial assistance in liquidating dealerships. Eventually the program did prove unsuccessful and manufacture of the Edsel was discontinued with a further appropriation of nearly $1 million for settlement of discontinued Edsel franchises.

Plaintiff asserts that it would not have acted as it did had the short duration of the Edsel program been foreseen. It is stipulated, however, and that stipulation is supported by the uncontradicted record, that the decision to discontinue manufacture and sale of the Edsel was not made until November 18, 1959, some time after the general release was signed.

We agree with the District Judge that there was no genuine issue as to a material fact and that plaintiff's general release bars this action. The release was given for a substantial cash consideration. The allegedly coercive statements made months prior to the release constituted statements of fact known to plaintiff that Ford had certain legal rights under the contract between the parties and the announcement that Ford was disposed to assert those rights.

Plaintiff did not execute the initial release form proposed by Ford. Plaintiff's attorney revised that form by adding certain terms.

Plaintiff ratified the release by retaining some $62,000 already received from Ford and by accepting an additional $24,000 after signing the release. Plaintiff asserts that the sums received did not constitute consideration for its present claims but that in the event of a jury finding otherwise, these sums could be set-off against damages received by plaintiff if successful. Evidently a set-off against damages is the only type of tender plaintiff has in mind, as Mr. Elwood Fabert made clear when in the course of a deposition he was asked if he would return the sum of $24,000 and refused to do so unless paid the damages he sought.

The plaintiff's allegations of fact do not support the conclusory charge that Ford conspired to violate the anti-trust law. Uncontested documentary evidence shows that Ford made an independent business decision free of anti-competitive purpose. A contract or combination is essential to a violation of the anti-trust laws. *Weir v. Chicago Plastering Institute,* 7 Cir., 1959, 272 F. 2d 883, 887.

But in any event, the release discharged all claims with certain specific exceptions which do not concern us here. It was a general release covering the claims set out in the complaint. *Duffy Theatres v. Griffith Consol. Theatres,* 10 Cir., 1953, 208 F. 2d 316, 323-4 and cases there cited, cert. den. 347 U. S. 935; *Clarke Baridon, Inc. v. Merritt-Chapman & Scott Corp.,* 4 Cir., 1962, 311 F. 2d 389, 394. Nor was this release contrary to public policy. *Duffy v. Griffith, supra,* p. 324. Plaintiff was not unlawfully coerced into releasing its claims. Plaintiff was represented by counsel and executed this instrument only after due deliberation with knowledge of the per-

tinent facts. *Alloy Products Corp. v. U. S., Ct. of Claims,* 1962, 302 F. 2d 528, 530. Economic coercion is not established by showing that the release was given under pressure of financial circumstances under threat of Ford's having recourse to an action Ford was legally entitled to take. *Kohen v. H. S. Crocker Co.,* 5 Cir., 1958, 260 F. 2d 790, 792.

We have carefully considered all points and authorities to which our attention has been invited, but find in them no basis for disturbing the action of the District Court.

The judgment of the District Court is affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1151

FABERT MOTORS, INC.,

Petitioner,

vs.

FORD MOTOR COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1151.

FABERT MOTORS, INC.,

Petitioner,

vs.

FORD MOTOR COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTIONS PRESENTED.

Whether on the undisputed material facts as a matter of law:

1. Petitioner's general release executed and delivered to respondent on October 2, 1959 was voluntarily executed and is valid.

2. Petitioner ratified the general release by its conduct subsequent to October 2, 1959.

3. Petitioner has failed to show that in marketing the Edsel respondent entered into any tie-in agreement in violation of the Sherman Act.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE.

This litigation concerns the validity of a written general release executed by petitioner, an automobile dealer, on October 2, 1959 in favor of respondent, an automobile manufacturer (Ford). The district court below found the general release to be valid and granted summary judgment in favor of Ford, and the Court of Appeals affirmed. If the determination below that the release is valid is correct, the antitrust question need not be considered, since the release would constitute a complete bar to both counts of the Amended Complaint.

Because petitioner's statement of facts (Pet. 3-9)[1] is wholly inadequate, respondent will set forth a statement of facts. Many of the facts in the record are admitted, stipulated or uncontradicted; where the evidence is in conflict, respondent resolves the conflict in petitioner's favor for purposes of this brief. Viewed in this manner, *i.e.*, considering only those facts as to which there is no genuine issue, as required by Rule 56 of the Federal Rules of Civil Procedure, the material facts are summarized as follows:

The General Release.

On October 2, 1959—three months after petitioner first submitted to Ford its written resignation of its dealership—petitioner executed a general release of claims against Ford and delivered it to Mr. Gruendler, a Ford zone manager. This release was submitted by petitioner

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1. "Pet." refers to the Petition in this Court; "App." refers to plaintiff-appellant's appendix and "Def. App." refers to defendant-appellee's appendix as filed in the Court of Appeals; petitioner has filed both appendices in this Court.

to its attorney and revised by him before its delivery to Ford (App. 32-33; Def. App. 30-32, 61-62).[2]

At the time Elwood Fabert (president, director and shareholder of petitioner) signed and delivered the general release, Gruendler delivered to Fabert a Ford check, payable to petitioner in the sum of $24,000 (App. 31-32; Def. App. 142). This payment was made pursuant to the conditions of petitioner's resignation (see Def. App. 49-52). Petitioner also received all the other sums due under the conditions of the resignation. In addition to the $24,000, Ford paid petitioner $5,000 for signs and $1,000 for special tools, and it paid petitioner for parts and vehicles which it also repurchased. After Fabert signed the general release on October 2, 1959, Ford paid petitioner amounts aggregating more than $62,000 in respect of this repurchased merchandise over a seven-month period, the last payment being made on April 27, 1960. Thus, in all, Ford paid petitioner more than $86,000 in settlement of its resignation (App. 34-36).

Petitioner made no objection to the signing of the release on October 2, 1959 or at any other time (App. 32; Def. App. 24, 31). Petitioner has retained all of the sums received pursuant to its conditional resignation, and up to the time of filing its complaint herein on August 15, 1961, made no effort to rescind the resignation or release, or offer to return any of these sums.

Plaintiff's Resignation.

Elwood Fabert sent a letter to Ford dated July 2, 1959 requesting termination of petitioner's Lincoln and Mercury sales agreements and providing, *inter alia*, for the payment by Ford, to petitioner, of $36,000 representing eighteen

2. A chronology of the pertinent events preceding and following plaintiff's execution of the general release is set forth as an Appendix, *infra*, p. 1a.

months' "rent" including the benefits under paragraph 22 of the Lincoln and Mercury sales agreements (Def. App. 56-57).

Fabert received a letter from Ford, dated July 15, 1959, rejecting petitioner's offer of July 2, 1959, and indicating that Ford would not agree to reimburse it in the sum of $36,000 for the dealership premises but would only be willing to aid and assist petitioner in disposing of the premises to the extent provided by paragraph 22, with a maximum liability of the fair rental value of the premises for a twelve-month period (Def. App. 47-48).

Fabert sent in another request dated August 10, 1959, in which the amount was changed to $24,000, to include the benefits of paragraph 22. Ford accepted this request on August 21, 1959 (Def. App. 27, 49-52).[3]

Several months prior to the acceptance of petitioner's resignation by Ford and petitioner's later execution and delivery to Ford of the general release, Fabert had two conversations with Thomas A. Coward, then Ford's Chicago District Sales Manager, at Fabert's place of business in Champaign. Elwood Fabert testified that petitioner's allegation that its execution of the resignation and general release was compelled by coercion and duress is based solely on statements made by Mr. Coward in these two conversations (Def. App. 34-37).

The first of these two conversations was in February of 1959, about eight months before the general re-

3. Paragraph 22 of these sales agreements (Def. App. 42-46) provides that upon termination of the agreement by Ford and in the event the dealer so elects, Ford shall aid and assist the dealer in disposing of or leasing the dealership premises to a third party. In fact, petitioner itself continued to occupy the premises, carrying on an automobile dealership for another make of cars under a franchise agreement which it entered into only three days after the effective date of its resignation as a dealer for respondent (Def. App. 20-21, 25-26).

lease was signed (App. 173). Fabert testified that in this conversation Coward suggested that Fabert "put in * * * between $40,000 or $50,000 and take the Edsel franchise." Fabert told Coward that he was not interested. According to Fabert, Coward then stated that he didn't think Fabert had any choice in the matter because Ford could, and would, cancel him out. Fabert testified that he told Coward he didn't think Ford would cancel him, and asked Coward to "Let me think it over" (App. 73-77).

The second of the conversations with Coward occurred on June 23, 1959, over three months before the general release was signed (App. 174). Fabert testified that in this conversation Coward stated that they were going to combine "the operations" and only have one dealer by October 1; that Coward further stated that if Fabert did not resign, he would lose his franchise; and that Coward and Fabert talked about what kind of a settlement would be made upon such a resignation, *i. e.*, how much "rent" Fabert would be able to get Ford to pay. Coward said that there was a regular form which Fabert should use, and he then wrote out the form for Fabert to copy (see App. 131), leaving blanks for the amounts to be paid by Ford for the purchase of signs and special tools, and for rent. After it was written out, Fabert told Coward that he would "send the letter on" (App. 78-82).

In fact, Fabert sent in such a letter after consultation with the attorney for his dealership corporation and after holding special meetings of the shareholders and directors duly recorded in minutes prepared by the attorney (Def. App. 27-28, 56-60).

Ford's Franchising.

Ford manufactures and sells automobiles, including Lincolns and Mercurys, and during the period from approximately October, 1957 until November 18, 1959, Ford also manufactured and sold the Edsel. At the time Ford commenced the sale of the Edsel, it had a separate Edsel Division, and, basically, a separate dealer organization. A disappointingly low volume of sales soon made it apparent to Ford that a separate Edsel dealer organization could not survive. It was also believed by Ford that the position of the Lincoln-Mercury dealers could be strengthened by their adding the Edsel as an additional car line. Rather than discontinue the Edsel, Ford determined that it should be marketed in conjunction with the Lincoln-Mercury organization. On January 3, 1958, Ford decided to merge the Edsel and Lincoln-Mercury divisions, creating the M-E-L Division. On April 15, 1958, it decided to combine Edsel dealerships with Lincoln-Mercury dealerships, and in that connection to give resigning dealers as much financial assistance as possible in liquidating their dealerships. Over $5,000,000 was appropriated and spent by Ford for this purpose (App. 135, 171; Def. App. 64, 68-136).

On November 18, 1959, after experiencing a particularly disappointing reception by the car-buying public of the new 1960 model Edsel, Ford decided to, and did, discontinue the manufacture and sale of the Edsel (App. 171; Def. App. 136-141). Ford appropriated nearly $1,000,000 to be paid to dealers who then were carrying the Edsel, in settlement of the discontinuance of their Edsel franchises (Def. App. 138-141).

ARGUMENT.

A. There Are No Considerations Warranting Certiorari.

There is no issue in this case warranting review by this Court on *certiorari.*

Petitioner asserts that this case is "a controversy of universal importance, having a nationwide impact" (Pet. 11), but fails to show that this broad assertion is true. Actually the issue in this case is uniquely narrow since it involves the particular circumstances under which this petitioner executed and subsequently ratified a general release in favor of respondent.

As is apparent from the face of the opinion of the Court of Appeals, it made no general holding that petitioner's execution of the general release *"ipso facto"* destroyed its remedy. Rather, it determined from *all* of the undisputed *material* facts that petitioner (1) "was not unlawfully coerced into releasing its claims" and (2) "ratified the release." (Addendum to Petition, page 8.)

Thus, the decision as to both the execution and ratification of this particular release, having been based on the undisputed facts peculiar to this case, has no importance except to the parties involved, and "ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts." *Appalachian Power Company* v. *American Institute of Certified Public Accountants,* 4 L. Ed. 2d 30, 32, 80 S. Ct. 16, 18 (1959) (Brennan, *J.* as Circuit Justice).

Secondly, petitioner seems to assert that the decision below is in conflict with Illinois law as to the validity of a release in two respects. (Pet. 14-15, 22-25.) First it is suggested that proper standards were not applied to determine whether there was coercion or duress in the execution of the release and whether there was ratification of the release. Next, it is suggested that under "the Illinois rule applicable to releases" there can be no determination as a matter of law as to whether or not a release was executed under duress and for adequate consideration. None of the Illinois cases cited by the petitioner supports these contentions.

We shall demonstrate below that under Illinois and federal law petitioner's release was not only valid on execution, but also was ratified by petitioner's subsequent conduct.[4]

In support of its contention as to an "Illinois rule applicable to releases," petitioner cites two cases each of which is inapplicable to the instant case in several respects, *Reede* v. *Treat*, 62 Ill. App. 2d 120, 129, 210 N. E. 2d 833 (1965) and *Bowman* v. *Illinois Central Railroad Company*, 11 Ill. 2d 186, 142 N. E. 2d 104 (1957). (Pet. 25.) In *Reede*, the court is applying what it describes as the policy of the Illinois courts with regard to the setting aside of releases for personal injuries on the ground of mutual mistake of fact as to the extent of the injuries when there is inadequate consideration. *Bowman* involves the scope of appellate review of jury verdicts in cases under the Federal Employer's Liability Act. In F. E. L. A. cases there is a special body of federal law which the Illinois courts follow.

In any event, there is no Illinois (or federal) authority holding that the validity of a release cannot be determined by summary judgment. Rule 56 of the Federal Rules of

4. As is apparent from the following discussion, there seems to be no difference between federal and Illinois cases on what constitutes duress in the execution of a release.

Civil Procedure certainly makes no exception of releases, and Illinois courts determine the validity of contracts allegedly made under duress as a matter of law. (See *e.g.*, *Illinois Merchants Trust Company* v. *Harvey*, 335 Ill. 284, 167 N. E. 69 (1929), and *Prontzinski* v. *Baker*, 364 Ill. 451, 4 N. E. 2d 62 (1936), *infra*, pp. 12, 14.)

Poller v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464 (1962) (Pet. 25), has no application to the question of determining the validity of a release by summary judgment. Moreover, the language of *Poller* quoted (Pet. 25) contemplates the use of summary judgment even "in complex antitrust litigation" if used "sparingly." *Poller* does not foreclose summary judgment in the instant case for the further reason that petitioner's version of the circumstances of the execution of the release as testified to fully by its officers was accepted by both courts below.

Even if petitioner's argument on the alleged "antitrust violation" (Pet. 16-21) were accepted, it would not constitute a ground for further review of this case.

B. The Decision Below Is Correct.

The courts below correctly determined on the basis of the record before them that there "is no genuine issue as to any material fact" and that respondent is "entitled to a judgment as a matter of law." Rule 56(c) and (e) of the Federal Rules of Civil Procedure. The district judge stated that after considering the extensive record, accepting the petitioner's version of the transactions and giving petitioner the benefit of any doubt, he would have had to direct a verdict in favor of the respondent if there had been a jury trial.[5] (App. 70-72.) See *Lundeen* v. *Cordner*, 354 F. 2d 401, 407 (8th Cir. 1966).

5. Actually, the issue of the validity of the general release is equitable and would have been triable to the judge rather than a jury. *Ruggles* v. *Selby*, 25 Ill. App. 2d 1, 165 N. E. 2d 733 (1960);

1. *As a matter of law on the undisputed facts there was no "duress" or "coercion" when the release was signed.* Rather than contending that the *release* was signed under duress, petitioner argues that it acted under duress when Fabert told Coward on June 23, 1959 that he would submit to Ford a letter of resignation (Pet. 7-8, 16). The issue, however, is whether petitioner was under duress when it signed the general release executed on October 2, 1959, over three months after Fabert's last conversation with Coward in Champaign, which occurred on June 23, 1959 (App. 174).

On this record there is no basis to find duress in Fabert's execution of the general release. This record shows numerous deliberate actions on the part of Fabert and his corporation, subsequent to the Fabert-Coward conversations, toward resigning from the Lincoln and Mercury sales agreements and, in return for substantial cash payments, settling all claims with Ford. Each of these actions was taken pursuant to authority duly granted by the corporation's board of directors and shareholders, after Fabert had ample opportunity to, and did, consult with the corporation's attorney, Mr. Tanner.[6] Moreover, each of the succeeding actions was several weeks apart, during which time the opportunity for free reflection and reconsideration was fully present.

The applicable authorities—under both federal and Illinois law—show that on these facts as a matter of law there was no duress when the release was signed. It is funda-

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Reede v. *Treat*, 62 Ill. App. 2d 120, 210 N. E. 2d 833 (1965). Thus petitioner has in reality already had its full day in court, particularly because the district judge below had an exhaustive record before him and resolved all conflicts therein in petitioner's favor (App. 70-72).

6. Petitioner's attack on Tanner's competence and attempt to minimize his role in these events (Pet. 23) is based on portions of Elwood Fabert's affidavit which were ordered stricken by the trial court (Def. App. 10).

mental that a claim of duress may not be maintained where the alleged duress is not present at the time of execution of the contract sought to be avoided. *Shlensky* v. *Shlensky*, 369 Ill. 179, 186, 15 N. E. 2d 694, 698 (1938); *Kaplan* v. *Kaplan*, 25 Ill. 2d 181, 188, 182 N. E. 2d 706, 710 (1962).

The test as to whether duress, if once imposed, remains in existence is to be determined by the actions of the alleged victim. Thus petitioner's contention that the alleged duress continued as long as Ford did not perform some affirmative act to "remove" it is erroneous (see Pet. 21-22). The cases discussed below specify the objective facts—viewed from the point of view of the victim's conduct, and not that of the alleged wrongdoer—which, if present, refute a claim that a particular act was performed under duress or business compulsion. All of these facts are present here.

One of the factors which refutes a claim of duress is that the alleged victim was represented by counsel at the time of the alleged duress, or that he had an opportunity to secure legal advice before taking the action allegedly compelled, or at least that he acted with deliberation when he took that action. E.g., *Combined Bronx Amusements* v. *Warner Bros. Pictures*, 132 F. Supp. 921 (S. D. N. Y. 1955) (summary judgment granted); *Sekulow* v. *11th & F. St. Valet*, 162 F. 2d 19 (D. C. Cir. 1947); *Alloy Products Corp.* v. *United States*, 302 F. 2d 528 (Ct. Cl. 1962); *Lackey* v. *First National Bank of Oblong*, 309 Ill. App. 308, 32 N. E. 2d 949 (1941).

Another such factor is that the alleged victim had knowledge of, or had opportunity to know, all the pertinent facts at the time of the alleged duress. *Lackey* v. *First National Bank of Oblong*, 309 Ill. App. 308, 32 N. E. 2d 949 (1941); *Stone's Beauty Shops* v. *Morrison Service Association*, 285 Ill. App. 163, 1 N. E. 2d 816 (1936); *Alloy Products Corp.* v. *United States*, 302 F. 2d 528 (Ct. Cl. 1962).

Still another factor refuting a claim of duress or business compulsion is that the matter claimed to constitute duress consists of no more than the mere pressure of financial circumstances. *Fruhauf Southwest Garment Co.* v. *United States,* 111 F. Supp. 945 (Ct. Cl. 1955); *Kohen* v. *H. S. Crocker Co.,* 260 F. 2d 790 (5th Cir. 1958) (summary judgment granted); *McKenzie-Hague Co.* v. *Carbide & Carbon Chemicals Corp.,* 73 F. 2d 78 (8th Cir. 1934).

The fact that the victim of alleged duress had an available remedy, at law or in equity, as an alternative to taking the action allegedly compelled, also refutes a claim of duress. *Sekulow* v. *11th & F. St. Valet,* 162 F. 2d 19 (D. C. Cir. 1947); *Joyce* v. *Year Investments,* 45 Ill. App. 2d 310, 196 N. E. 2d 24 (1964); *Illinois Merchants Trust Co.* v. *Harvey,* 335 Ill. 284, 167 N. E. 69 (1929). A contract may not be rescinded because of one party's ignorance of the law. *Kazwell* v. *Reynolds,* 250 Ill. App. 174 (1928); see also *Warshawsky* v. *American Automotive Products Co.,* 12 Ill. App. 2d 178, 183, 138 N. E. 2d 816, 818 (1956); *Chicago* v. *Atkins,* 19 Ill. App. 2d 177, 182-83, 153 N. E. 2d 302, 304 (1958). Moreover, in *Illinois Merchants Trust Company* v. *Harvey,* 335 Ill. 284, 167 N. E. 69 (1929), the court, *in affirming a directed verdict,* establishes that it is the *existence* of a remedy, not the plaintiff's knowledge or lack of knowledge of it, which determines if duress has occurred. The statutes upon which petitioner relies in this case, and the remedies provided therein, were all in effect long before the events of which petitioner here complains.[7]

7. Further, it is Ford's position that in the circumstances of this case Ford had a legal right to terminate petitioner's Lincoln and Mercury sales agreements. See paragraph 17(a)(6) of the sales agreements (App. 177). Thus the purported Coward statements in February and June, 1959, merely informed petitioner that Ford would exercise its legal right, which does not constitute economic duress. *Kohen* v. *H. S. Crocker Co.,* 260 F. 2d 790, 792 (5th Cir. 1958); *Lackey* v. *First National Bank of Oblong,* 309 Ill. App. 308, 318-19, 32 N. E. 2d 949, 954 (1941).

The record in this case presents, on the undisputed facts, all of the factors relied upon in the above authorities as grounds for refuting a claim of duress. The courts below were correct in holding that as a matter of law the general release was voluntarily and freely executed and delivered by petitioner to Ford and is valid.

2. *Petitioner's general release is valid because petitioner has ratified it.* An additional ground supporting the validity of the release is that petitioner's conduct subsequent to its execution, and subsequent to the discontinuance of the Edsel, constitutes a ratification of the release.

Petitioner executed the general release on October 2, 1959 and the Edsel was discontinued on November 18, 1959. Subsequent to October 2, 1959, when Ford paid petitioner $24,000, Ford made numerous and substantial other payments to petitioner (App. 34-36). These payments, totaling more than $62,000, were paid over a period of time extending from October 6, 1959 to April 27, 1960.

Petitioner accepted and retained all of these payments. Further, between petitioner's willing acceptance of the last payment from Ford on April 27, 1960 and the filing of the complaint on August 15, 1961—a period of some sixteen months—petitioner made no effort to repudiate or rescind its resignation, nor to return any of these sums. Fabert testified that he never discussed the matter of the termination of his dealership with any representative of Ford other than Mr. Coward, and that he never wrote anyone any letters about it (Def. App. 23, 143). This fact is particularly significant in the light of the provisions of petitioner's sales agreements which required it to notify the Chairman of Ford's Dealer Policy Board of any acts of the kind petitioner now complains. (Def. App. 38.)

Under the applicable authorities, these undisputed facts lead to the conclusion that petitioner has ratified the general release and now has no right to set it aside. *E.g.*, *National City Bank of Chicago* v. *Wagner*, 216 Fed. 473 (7th Cir. 1914), certiorari denied, 235 U. S. 698 (1914); Annotation, "Ratification of Contract Voidable for Duress," 77 A. L. R. 2d 426, 428-29 (1961).

In *Prontzinski* v. *Baker*, 364 Ill. 451, 4 N. E. 2d 62 (1936), where plaintiffs claimed a contract had been executed under fraud and duress, the Supreme Court *affirmed the trial court's directed verdict* for the defendants at the close of all the evidence, stating (364 Ill. at 455-56, 4 N. E. 2d at 863-64):

> "We are of the opinion that the evidence produced by appellants does not show duress, coercion or undue influence. Even assuming that appellants, because of threats, were induced to sign the contracts on June 11 and 14, it is clear from their testimony that they not only were not influenced by coercion or duress on July 2, when they made the deed and bill of sale and accepted the purchase price, but that they did so after seeking and accepting advice from their own attorney. *This, even granting they had made a case of coercion as to the signing of contracts, constitutes a ratification of their former acts.* It is also significant that after signing the contracts appellants furnished an abstract of title and delivered it to Baker's attorney for examination." [Emphasis supplied.]

In *Duffy Theatres* v. *Griffith Consolidated Theatres*, 208 F. 2d 316 (10th Cir. 1953), certiorari denied, 347 U. S. 935 (1954), an antitrust case, the court, *affirming the trial court's summary judgment*, upheld the release of the asserted antitrust claim on the ground, among others, that the release was not void, merely voidable, and that plaintiff had not fulfilled his duty to rescind or disaffirm "with due diligence and within a reasonable time" after acquiring

knowledge of the facts supposedly constituting grounds for such rescission or disaffirmance.

This requirement of prompt disavowal of an act supposedly done under coercion is also recognized in many other cases. E.g., *Barnette* v. *Wells Fargo Nevada Nat. Bank,* 270 U. S. 438, 444 (1926); *Chatz* v. *Armour Plant Employees' Credit Union,* 154 F. 2d 236, 241 (7th Cir. 1946), certiorari denied, 329 U. S. 728 (1946); *Shell Oil Co.* v. *Cy Miller, Inc.,* 53 F. 2d 74 (9th Cir. 1931).

The fact that, prior to filing its complaint herein, petitioner did not offer to return any of the large amounts of cash paid to it by Ford is a particularly strong reason why petitioner must be held to have ratified the general release. A "tender or offer to return the consideration received for the release is ordinarily held to be a condition precedent to its being set aside." Annotation, 53 A. L. R. 2d 757, 758 (1957); *Kirkeby* v. *Avenue Hotel Corporation,* 330 Ill. App. 246, 70 N. E. 2d 423 (1947). An offer of set-off is not sufficient. *Wollenberger* v. *Hoover,* 346 Ill. 511, 577-78, 179 N. E. 42, 68-69 (1931).

3. *There is no evidence sufficient to raise any issue that Ford's action in marketing the Edsel constituted a "tie-in" in violation of the Sherman Act.* The alleged "tying" product and its market were not separate and distinct from the "tied" product and its market (App. 6, 39). *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 5-6 (1958); *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 614 (1953). There was no exclusion of competitive products and no agreement between petitioner and Ford. *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 5-6 (1958); *Susser* v. *Carvel Corporation,* 332 F. 2d 505, 512 (2d Cir. 1964), cert. dismissed, 381 U. S. 125 (1965).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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April 21, 1966.

APPENDIX.

Chronology of Events.

February, 1959	First Fabert-Coward conversation in Champaign	(App. 73-77, 173)
June 23, 1959	Second Fabert-Coward conversation in Champaign (*last act of alleged duress by Ford*)	(App. 78-82, 174)
July 2, 1959	Meeting of petitioner's shareholders and directors authorizing first resignation, and submission thereof to Ford, enclosing minutes prepared by petitioner's attorney	(Def. App. 56-60)
July 15, 1959	Ford letter to petitioner rejecting first resignation	(Def. App. 47-48)
August 10, 1959	Meeting of petitioner's shareholders and directors authorizing second resignation, and submission thereof to Ford, enclosing minutes prepared by petitioner's attorney	(Def. App. 49-50, 53-55)
August 21, 1959	Ford letter to petitioner accepting second resignation	(Def. App. 51-52)
September 8, 1959	Petitioner made dealer for Fiat and Triumph automobiles in same premises	(Def. App. 20-22, 25-26)
October 2, 1959	General release signed by petitioner after being redrafted by its attorney, and Ford payment to petitioner of $24,000	(App. 31-33; Def. App. 31-32, 61-62)
October 6, 1959	Ford payment to petitioner of $5,900.25	(App. 34-36)
October 28, 1959	Ford payment to petitioner of $3,442.17	(App. 34-36)
November 6, 1959	Ford payment to petitioner of $16,208.83	(App. 34-36)
November 9, 1959	Ford payment to petitioner for vehicles	(App. 34-36)
November 13, 1959	Ford payment to petitioner of $284.45	(App. 34-36)
November 18, 1959	Edsel discontinued	(App. 171)
January 11, 1960	Ford payment to petitioner of $107.25	(App. 34-36)
January 18, 1960	Ford payment to petitioner of $29,235.36	(App. 34-36)
January 28, 1960	Ford payment to petitioner of $1,432.63	(App. 34-36)
March 1, 1960	Ford payment to petitioner of $124.76	(App. 34-36)
April 27, 1960	Ford payment to petitioner of $4.57	(App. 34-36)
August 15, 1961	Complaint filed in this action	(App. 1)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1151.

FABERT MOTORS, INC.,
Plaintiff-Petitioner,

v.

FORD MOTOR COMPANY, a Corporation,
Defendant-Respondent.

REPLY BRIEF OF PETITIONER.

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